

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and Part 90) WT Docket No. 96-18
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act --)
Competitive Bidding)

To: The Commission

REPLY COMMENTS OF BLOOSTON, MORDKOFKY, JACKSON & DICKENS

The Washington, D.C. telecommunications law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its paging carrier clients listed in Attachment A hereto (hereinafter the "Commenters") and pursuant to Section 1.415(c) of the Commission's Rules, hereby submits reply comments in the above-captioned proceeding.¹

I. Geographic Coverage Requirements for the Nationwide Paging Licensees are Necessary to Level the Competitive Playing Field.

The nationwide paging carriers participating in this phase of the proceeding have made some persuasive arguments against applying build-out requirements to nationwide licensees. For example, it is argued that such requirements would destroy licensee expectations, and strand their investment (See AirTouch Paging Comments at 2; PageNet Comments at 5-6); that these carriers have a reliance interest in their ability to expand

¹ The Commenters are paging carriers of various sizes, licensed by the Commission to operate on frequencies allocated under Parts 22 and 90 of the Commission's Rules. While some of these carriers operate substantial regional paging systems in which they have invested millions of dollars, none is a nationwide paging licensee. Therefore, unlike the nationwide licensees, which are currently exempt from the Commission's auction process and build-out requirements, the Commenters will be required to participate in the Commission's auction process in order to preserve their ability to expand and modify their paging systems -- indeed to preserve their existence and survival.

(PageNet Comments at 6); that such requirements would constitute a retroactive rulemaking, an improper modification of license under Section 316 of the Communications Act of 1934, as amended (the Act), and a "taking" under the Fifth Amendment of the U.S. Constitution. See Comments of Paging Network, Inc. at 5;. Many of these same arguments have been made against the whole concept of market area licensing of non-nationwide paging channels. See e.g., March 18, 1996 Comments of Radiofone, Inc. at 3 - 4; March 18, 1996 Comments of the Paging Coalition at 2 - 3. The Commenters agree that there are potentially harmful effects associated with the proposed build-out requirements, but such effects will pale in comparison with the adverse impact that market area licensing in general will have on local and regional paging systems. If the paging auction scheme is implemented as adopted, nationwide licensees must likewise be subject to a buildout requirement.

Thus, while the Commenters agree with the nationwide licensees that the imposition of new coverage requirements for nationwide paging systems may constitute a modification of their existing licenses, the only solution in avoiding the problems of coverage requirements is to eliminate the market area licensing scheme for paging altogether. Without keeping the status quo ante, modification of the nationwide paging licenses is necessary to level the competitive playing field between the nationwide licensees (who can provide both nationwide and regional/local paging services) and the non-nationwide carriers (who can provide only regional/local paging services), and to avoid discriminatory treatment of the non-nationwide paging carriers. The Commission must modify the terms of the nationwide paging licenses since the non-nationwide paging carriers, which number several hundred, will no longer be able to expand their systems to meet subscriber demands on a site-by-site basis. In order for these carriers to expand or fill-in their service areas in the future, the non-nationwide carriers will be required to participate in the Commission's

geographic area auctions, and be bound by the attendant requirements, including coverage requirements.²

This change in the regulatory landscape affects all licensees, nationwide and non-nationwide alike. Other carriers, including some of the Commenters, have invested millions of dollars in their systems. All have built their systems with the reasonable expectation that they would be able to expand their coverage in response to future demands for new service, especially to those areas where they have co-channel transmitters close enough that the area has little practical value to another carrier -- i.e., to the "gaps" in their coverage. These carriers will likewise suffer a "taking," under the Fifth Amendment, in that the value of their systems will be compromised and their investments stranded. The Commission is obligated to regulate in a manner which maintains the competitive neutrality between the nationwide and non-nationwide carriers, so that the nationwide carriers will not be placed at an unfair competitive advantage in the marketplace. It is enough that the nationwide licensees will not be required to bid to preserve their expansion rights on the channels for which they have nationwide exclusivity. But, to not require a coverage requirement that is similar in scope to that required of the non-nationwide carriers, will allow the nationwide carriers to "skim the cream" of the market by expanding only in those areas where it is profitable to do so,³ without regard to other areas that might also need a nationwide service. Thus, by not imposing a coverage requirement on the nationwide licensees, the Commission would be shirking its responsibility to ensure efficient utilization of the spectrum and the

² Under the Commission's proposal, geographic area licensees would be required to provide service to one-third of the population within the geographic market within three years, and to two-thirds of the population within the geographic area within five years of license grant.

³ The Commission's current coverage requirements to qualify for nationwide exclusivity make it possible for a nationwide licensee to have significant service gaps, because a licensee is only required to construct 300 transmitters nationwide. This constitutes less than one transmitter per Basic Trading Area (BTA). Indeed, since full coverage of a major urban area requires many transmitters, nationwide carriers are capable of achieving the 300-transmitter requirement without extending service beyond the top-30 markets.

provision of a essential services to the public. These carriers could thereby avoid providing a true nationwide service to the public.

Certain nationwide carriers argue that a build-out requirement is not necessary, because the 300-transmitter requirement is essentially equivalent to the coverage requirements imposed on non-nationwide licensees. See e.g., Comments of Paging Network, Inc. at 4 - 5. If this is the case, then nationwide carriers should have little difficulty meeting the same requirements imposed on other carriers -- coverage to one-third of the population in three years, and two-thirds of the population in five years.

II. Partitioning of Nationwide and Smaller Markets is in The Public Interest.

The Commenters support the various nationwide licensees' request that the Commission permit partitioning of nationwide frequencies. Comments of Page Mart II, Inc. at 4; Comments of AirTouch Paging at 3; Comments of ProNet, Inc. at 7 - 8; Comments of Personal Communications Industry Association, Inc. at 6. Such partitioning will bring out the efficient use of spectrum by making smaller geographic areas available to rural area businesses, which areas might otherwise not be served by the nationwide licensee. Thus, partitioning of nationwide paging licenses would serve the public interest by facilitating the build-out of paging systems in areas that otherwise might go unserved for the foreseeable future.

And, for the same reasons discussed above, the Commenters support the Commission's proposal to permit the partitioning of the smaller geographic markets, i.e., Major Trading Areas (MTAs) and Economic Areas (EAs). However, the Commenters are concerned that, because these markets will have been subject to auctions, such partitioning should not adversely affect the financial obligations of the parties. Thus, if an entity, which qualified for special considerations as a small business, partitions its license to another entity which meets the Commission's small business definition, the licensee of the partitioned area should be permitted to assume the pro rata portion of the outstanding debt associated with

the partitioned area and should be solely responsible for payment of the debt on an installment basis.⁴

The outstanding debt should be calculated on the basis of population, so that if the partitioned area covered 20 percent of the population in the affected market, the licensee of the partitioned area would only be liable to the government for 20 percent of the outstanding balance, as of the close of the transaction. If, on the other hand, the partitioned area licensee does not qualify for small business status, the Commenters support the industry consensus that the outstanding debt associated with the partitioned area be accelerated, and that the Commission's consent to the partition be conditioned upon timely receipt of the outstanding debt balance. In this way, neither party to the partitioning transaction would be unjustly enriched.

The Commission should also adopt safeguards to ensure that market area licensees do not utilize the partitioning process as a means for creating sham transactions. As correctly pointed out by AirTouch Paging and Metrocall, Inc., without proper safeguards, the partitioning process could be utilized to trigger new coverage deadlines since arguably the licensee of the partitioned area would be a "new" licensee. Thus, except in the limited

⁴ AirTouch Paging (AirTouch) submits, in order to prevent sham transactions, that the parties to the partition should be jointly liable for payment of financial obligations associated with the partitioned area, and that a default by either would result in the automatic termination of both licenses covering the entire market area. Comments of AirTouch Paging at 5. The Commenters oppose AirTouch's proposal, noting that a default of one party to the partitioning transaction could jeopardize the licenses for the entire market. In order to assure payment, the party receiving the partition should become the party financially responsible for payment of any debt to the government associated with that geographic area, while the party partitioning its license remains liable for that portion of the market which it retains. In that way, if one party defaults on its obligations to the government, service authorized in other areas will not be jeopardized. To hold both parties jointly and severally responsible for payment of any debt due to the government arising out of the auction of the market area license will chill legitimate partitioning arrangements and dramatically slow service to the public. A carrier may invest millions of dollars in serving a portion of a market area, and serve thousands of customers, only to have this investment squandered and service terminated due to circumstances beyond its control -- the default of another licensee serving a different portion of the market area. Small businesses could not risk partitioning under such circumstances, and the proposed AirTouch restriction would thus act as a barrier to entry.

circumstances described below, partitioning of a market area license should not trigger a new construction period, and the coverage deadline should remain that of the MTA or EA, from which the partitioned area was carved. The exception to this rule should be where the partitioning has occurred too close, through no fault of the parties, to a construction benchmark deadline. In those circumstances, the Commenters support Metrocall's recommendation that the Commission liberally grant extensions of the construction deadline. Comments of Metrocall at 21 - 22. Such extensions would be necessary to prevent undue prejudice to small businesses, which are most likely to become licensees of partitioned areas. And, since such extensions would help ensure the rollout of paging service in unserved areas, extensions of time in this limited circumstance would be in the public interest.

III. Disaggregation of Paging Spectrum Does Not Appear to be Viable at This Time.

Several parties commented on the Commission's proposal to permit disaggregation of paging spectrum. The Commenters agree with the comments of the Personal Communications Industry Association, Inc. (PCIA), that disaggregation of paging spectrum may not be a viable alternative, given the potential for harmful co-channel and adjacent channel interference in attempting to disaggregate channels with 30 kHz bandwidth or less. Comments of Personal Communications Industry Association, Inc. at 8; Comments of Page Mart II, Inc. at 4; Comments of Metrocall, Inc. at 23. Because of these interference concerns, the Commenters urge the Commission to defer the adoption of rules permitting spectrum disaggregation until technology is able to avoid the potential interference problems.

IV. The Commission Should Adopt Measures to Combat Fraud in the Application Process.

The Commenters fully support measures to reduce application-mill fraud in the application process. Because the Commission has determined that it will not auction the shared paging frequencies, the Commenters fear that once applications are accepted for these frequencies from all applicants, the application mills will seek to heavily license the

channels, thereby upsetting the delicate balance created by the legitimate carriers who have negotiated sharing arrangements.

While the Commenters do not believe that conversion of the shared paging frequencies to exclusive use is viable, the Commenters agree that there are other measures the Commission could take in order to curb fraud associated with shared channel licensing: (a) incorporate the text of paragraph 219 of the Commission's Further Notice of Proposed Rulemaking in public information literature and the signature block of FCC Form 600 (in bold capital letters); (b) require application preparers, including application mills, to incorporate this warning in all solicitations in a conspicuous manner (e.g., specific size type face, etc.), so that prospective investors are aware of the attendant risks associated with filing applications and if granted, the construction requirements; and (c) require the frequency coordinator to limit the number of licensees placed on a particular frequency in a particular area in order to deter speculation. See Comments of AirTouch at 8 - 9. The latter measure would not convert the shared paging spectrum to exclusive use, but instead would act as a licensing cap, based upon the level of usage on the channel (which could be determined by the number of pagers placed in operation by the incumbent carriers). It would offer protection to investors against the dilution of the value of the licenses but, more important, would offer a level of protection to legitimate carriers from speculators.

The Commission's proposal to require application preparers certify the accuracy of the contents of the application is ill-advised. As Metrocall noted, requiring such certifications would unfairly subject legitimate consulting engineers and law firms to monetary forfeitures under Title V of the Communications Act of 1934, as amended (the Act), and criminal liability under Title 18 of the U. S. Code, since most preparers rely on the representations of their clients. See Comments of Metrocall at 18. Exposure to this sort of liability would force many law firms and consulting engineers to avoid any involvement

in the application process altogether, leaving the bulk of the work to less scrupulous application preparers. *Id.* at 19.⁵

V. Conclusion.

In light of the foregoing, it is respectfully requested, if the Commission proceeds with market area licensing, that the Commission (i) impose build-out requirements for the nationwide paging licenses in order to assure competitive neutrality with the non-nationwide paging carriers; (ii) permit partitioning of the nationwide and smaller paging license areas in order to facilitate the provision of paging services to the rural areas; (iii) adopt measures which permit the partitionee to assume the pro rata portion of the outstanding debt associated with the partitioned license area, thereby relieving the partitioner of further liability for the area; (iv) adopt safeguards, including limits on extensions of build-out benchmarks, in order to ensure that the partitioning process is not used as a means for creating sham transactions; (v) adopt anti-fraud measures to warn potential applicants that there is no certainty that paging operations will be profitable and of the construction requirements, but limit any anti-fraud measures that would unfairly impinge on consulting engineers and law firms; and (vi)

⁵ An unscrupulous application mill could avoid the certification requirement by "ghost writing" the application so that the FCC is not even aware that the application was prepared by an outside source.

not convert the shared paging channels to exclusivity, although the Commission should consider imposing a licensing cap based upon the number of pager receivers authorized.

Respectfully submitted,

**BLOOSTON, MORDKOFKY, JACKSON
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Dated: May 1, 1997

ATTACHMENT A

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Penasco Valley Telephone Cooperative, Inc.

Clifford D. Moeller and Barbara J. Moeller d/b/a Valley Answering Service

AzCOM Paging, Inc.

Oregon Telephone Corporation

Ventures in Paging L.C.

Professional Answering Service, Inc.

Prairie Grove Telephone Company

Cascade Utilities, Inc.

Cleveland Mobile Radio Sales, Inc.

Telephone & Two-Way, Inc.

Lubbock Radio Paging Service, Inc.

Com-Nav, Inc. d/b/a Radiotelephone of Maine

Robert F. Ryder d/b/a Radio Paging Service

Arthur Dale and Angelina Hickman d/b/a Omnicom

Radiofone, Inc.

SERVICE LIST

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